No. 51029

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| CITY OF CHICAGO, a municipal corporation, Plaintiff-Appellee, v. MARY QUANE, Defendant-Appellant. | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, MUNICIPAL DEPARTMENT, DISTRICT ONE. Irving Kipnis, M. |

MR. JUSTICE MC NAMARA DELIVERED THE OPINION OF THE COURT.

Defendant, Mary Quane, was found guilty of a violation of the disorderly conduct ordinance of the City of Chicago and was fined $50.00. She appeals, contending that she had been charged with a criminal offense and that she improperly had been denied the right to counsel.

On August 16, 1965, a complaint was filed by the City of Chicago charging the defendant with disorderly conduct in that she did wilfully assault another, or was engaged in aiding or abetting, in a fight or quarrel or other disturbance . . . in violation of section 193-1 of the Municipal Code of the City of Chicago. A warrant was issued on this complaint. On September 1, 1965, an order was entered showing that defendant was present in court without warrant, capias or other writ. The order recited that defendant waived trial by jury, and that the court having heard the evidence and arguments of counsel and being fully advised in the premises found the defendant guilty and fined her fifty dollars. The fine was satisfied on the same day.

On September 9, 1965, the record indicates that by order of court the cause was continued to October 6, 1965. On October

6, 1965 a motion for a new trial was entered and continued to October 20, 1965. The cause again was continued to October 21, 1965. On October 21, defendant filed her written motion for a new trial accompanied by her affidavit in support of the motion. The affidavit, inter alia, stated that she had been charged with assault; that she was unaware of court procedures; that she had been advised to get a lawyer but that a lawyer friend was unavailable for September 1, 1965, but she had been assured that the court would give her time to get counsel. The affidavit further stated that she intended to ask time to get an attorney but before she made such a request, the court asked her "How do you plead" and she responded "Not Guilty"; that the complainant was represented by an attorney; that during the trial she requested an attorney but the court reminded her that trial had begun and of her plea of not guilty; that on September 7, 1965, she orally moved for a new trial; that she had an adequate defense based upon eye witness testimony not available to her on September 1; and without being granted a new trial that she will have been denied a fair trial. Defendant's motion for a new trial was denied by the court, and this appeal follows.

There is no report of proceedings in the record. The only allegation that the defendant was denied counsel comes from the affidavit made by her and attached to the motion for a new trial. Alleged errors of the trial court cannot be considered by the reviewing court when they appear solely from the recitals of an affidavit accompanying a motion for a new trial. Hoffman v. Wilson, 60 Ill. App.2d 396, 208 N.E.2d 607 (1967).

Since defendant's affidavit cannot be used to raise the issue, there is nothing in the record to substantiate her claim that she was denied the right to counsel. Accordingly, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and LYONS, J., concur.

51351-2

98 I.A.2/136

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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. CLARENCE WILLIAMS and A. J. WHITNEY, Defendants-Appellants. | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION. Hon. Casimir V. Cwiklinski, Judge Presiding. |

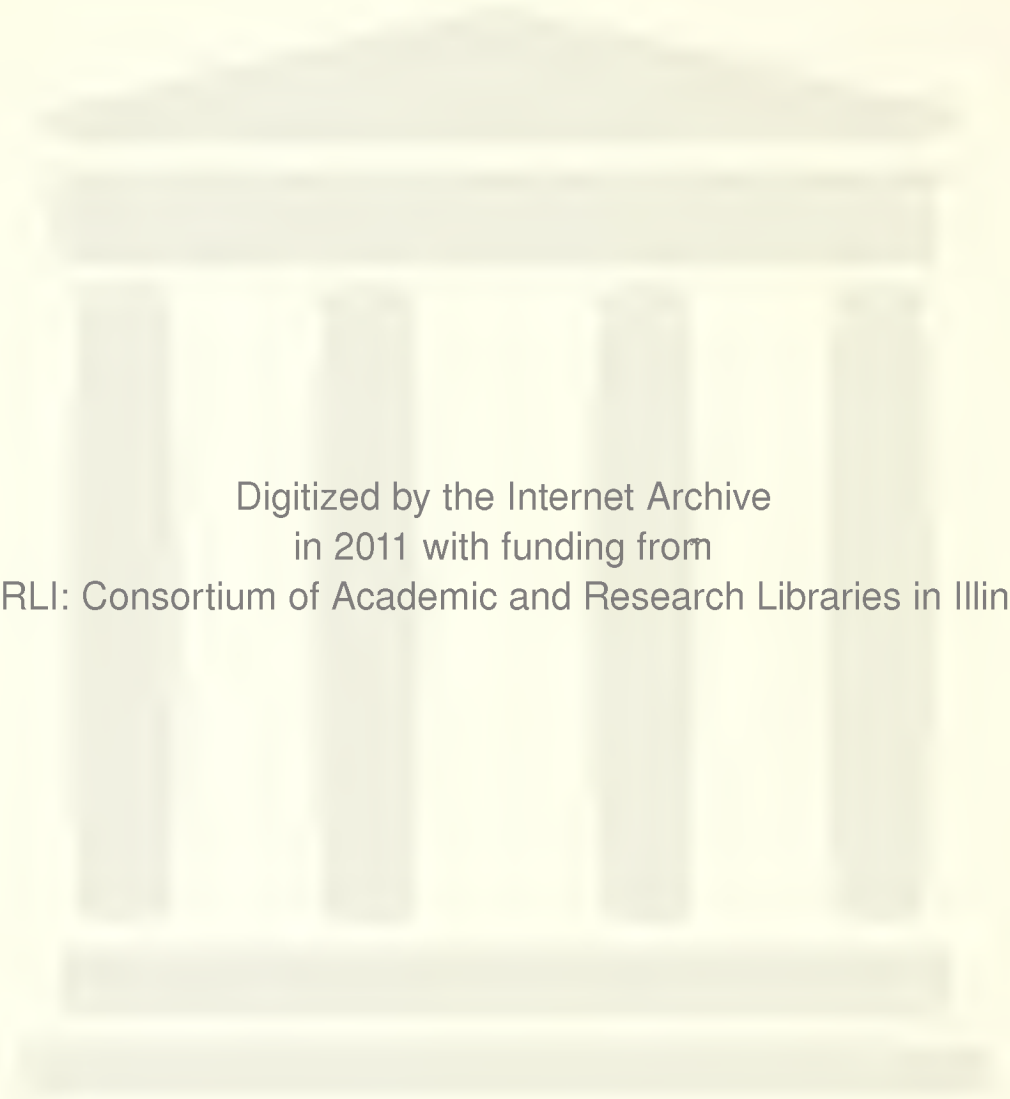
MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

Codefendants, Clarence Williams and A. J. Whitney, were jointly indicted, tried and convicted in a bench trial for the offense of armed robbery. The court sentenced defendant-Williams to a term of from not less than three (3) nor more than six (6) years, and defendant-Whitney to a term of from not less than four (4) nor more than eight (8) years, to be served in the State Penitentiary. The codefendants bring this consolidated appeal from their convictions contending that they were denied a fair trial. They address no challenge to the sufficiency of the State's evidence.

Defendant-Williams urges on review: (1) that the prosecution exceeded the legitimate bounds of impeachment of defendant as a witness in his own behalf by introducing and reciting the entire context of his written confession while cross-examining him, (2) that defendant was prejudiced by testimony relative to an incriminating oral admission by defendant-Whitney which was neither made in his presence nor assented to by him, and (3) that he was further prejudiced by the introduction of testimony suggesting his commission of another and unrelated crime.

Defendant-Whitney asserts that error was committed by the testimony concerning two incriminating oral confessions given by defendant-Williams in his presence, but to which the evidence shows he "stood silent" and did not assent.

The facts involve the armed robbery of the complaining



witness, Edward Martin, on November 20, 1965. At approximately 1:30 A.M. on that date, Martin, an acquaintance, Mr. Pen Watkins, the two defendants and a fifth person identified as Whitney's girl friend, Miss Debra Barnes, met in the Chili Bowl Restaurant located at 6249 South Cottage Grove Avenue in Chicago. Someone suggested that they have a party, and the group proceeded in Martin's automobile to a package liquor store in the vicinity of 63rd and South Park Avenue where a fifth of whiskey was purchased. They then journeyed to Williams' apartment located at 6225 South Greenwood Avenue.

Shortly after their arrival, Martin excused himself to visit the washroom located outside and down the hall from the apartment. In his absence, an apparently unprovoked attack upon Watkins' person occurred. Watkins recalled only that he was struck from behind with a hard object by one of the codefendants and lapsed into a state of unconsciousness. He stated that he did not awaken until sometime later in the hospital. As Martin reentered the apartment, he was first hit from the rear by Whitney and then struck in the face from the front by Williams. Williams allegedly used a stick to hit Martin which he identified as People's Exhibit No. 1. A tussle ensued between Martin and the codefendants during the course of which Whitney brandished a revolver and threatened to shoot the victim.

Martin relented, was bound and gagged by the assailants, and struck to the ground by another blow to his head. The victim lay motionless on the floor as if he were dead, hearing glass breaking and observing Watkins falling or being thrust out the apartment window. The defendants thereupon seized the complainant's topcoat, shoes, hat, keys and $236.00 in cash from his person. Following their flight, Martin unloosed his bonds and notified tenants in the building to summon the police. Upon

the arrival of the police to the scene, Martin inquired as to the whereabouts of his car, a 1963 Cadillac coupe. The car was discovered to be missing. Watkins and Martin were thereafter transported to Cook County Hospital for treatment of the multiple injuries sustained in the beatings. Both codefendants were identified at trial by the two victims.

The codefendants both testified and gave essentially the same account of the circumstances, differing only with respect to the manner in which the fight had been provoked. The defendants disagreed as to whether Martin or Watkins had made improper advances towards Miss Barnes in the apartment. They represented that when reprimanded by Whitney, Martin pulled a knife and slashed Whitney across his arm. Watkins allegedly then displayed a revolver. Williams stated that he hit Watkins and knocked him out while, at the same time, Whitney struck Martin to the floor with his fists. Watkins having supposedly regained consciousness, another struggle occurred during the course of which he fell backwards, out the window. The defendants testified that they became frightened by the event and left the premises without taking any of Martin's belongings or money.

Testifying in rebuttal, Police Officer Lawrence Fenlon described the circumstances occasioning defendant-Williams' arrest on November 23rd. While on routine patrol, Fenlon had observed an automobile violate a red light which he immediately pursued. Upon curbing the vehicle, Williams and another occupant fled from the car and were chased by Fenlon and his companion. After overtaking Williams, Fenlon related, "I asked him why he was running. He said he was running because he knew that the car was stolen." Defendant-Williams' objection to this remark was promptly sustained and ordered stricken by the court. It was indicated that Williams had given information which led to

Whitney's subsequent arrest that same day.

It does not appear that the automobile to which Williams allegedly referred was the same vehicle stolen from the complainant to facilitate the codefendants' flight from the armed robbery. We can nonetheless sense no deliberate effort by the prosecutor to solicit this remark in an attempt to prejudice the court against Williams. It is manifest from the record that the trial judge was cognizant of the improper nature of this form of evidence and unhesitatingly sustained defendant's objection to the witness' response. Where, as here, the trial judge sat as the trier of both law and fact, absent a jury, and there is present ample credible evidence to otherwise support his finding of guilt, we cannot say that defendant was prejudiced and deprived of a fair trial by the injection of this isolated adverse comment into the trial of his cause. People v. Morton, 21 Ill.2d 139, 171 N.E.2d 592 (1961).

We next come to the myriad of objections on review directed to the confessions and/or admissions of the respective codefendants. Considered initially, we find no improprieties of moment relative to the State's utilization of Williams' written and signed confession for impeachment purposes on cross-examination. The essence of defendant's contention is that the State seized upon the occasion of cross-examination to recite the entire context of his confession, consuming four pages of transcribed narrative in the record. The confession itself had been obtained at approximately 5:00 P.M. on the day of his arrest by Police Officers Mikolitis and Kaminski.

It is established law that evidence of a prior inconsistent statement made by a witness is admissible to impeach his credibility, and by so doing the offer is not one of substance to prove the truth of the facts asserted thereby, but rather to cast doubt

upon the veracity of the witness' testimony by showing the extent of the inconsistency. People v. Morgan, 28 Ill.2d 55, 190 N.E.2d 755 (1963). Neither defendant moved to suppress the confession nor address an objection to its presentation in the trial court, and by settled rules of practice is deemed to have waived his complaint for consideration on review. People v. Williams, 28 Ill.2d 114, 190 N.E.2d 809 (1963). Aside from this inherent failing in his theory, he has demonstrated no circumstances by which we might conclude that actual prejudice emanated from this procedure.

We cannot find justification to now entertain the argument that defendant's confession was taken by the court below, under the guise of impeachment, as substantive evidence of his guilt. For this proposition defendant proceeds upon the fallacious assumption that both the prosecution and defense offered equally plausible accounts of the events of the day in question. To the contrary however, the testimony of the codefendants was, independent of the impeaching confession, in itself of such an incredible nature as is apparent to the court from the self-contradictory and highly improbable circumstances they sought to portray.

The alleged confession, as it had been previously transcribed, was read in the form of one general question and one lengthy continuous response by Williams describing the entire day's events of November 20, 1965 from and after the initial meeting in the Chili Bowl Restaurant. It does not appear that Williams' statement was offered for its repetitious or cumulative effect upon the court. Contrary to Williams' argument that he had admitted to the inconsistencies on cross-examination, he testified, "Some of it was correct and the rest of it was wrong," without articulating as to in what respect he made that representation. On redirect-examination, he again reaffirmed that the

statement was not all true.

Subsequently called to testify in surrebuttal, Williams admitted to his signature thereon, as well as his familiarity with the two victims, but categorically denied that he had ever told the police that he attacked and robbed Martin and Watkins. Notwithstanding these partial concessions, we do not feel that the State was foreclosed from adducing further proof of the inconsistency. People v. Williams, 22 Ill.2d 498, 177 N.E.2d 100 (1961); People v. Hahn, 90 Ill.App.2d 367, 234 N.E.2d 142 (1967).

Defendant-Williams is similarly not warranted in asserting that by this technique he was precluded from challenging the voluntariness of his confession. Although as previously noted, no objection had been made, the record clearly indicates that the question of voluntariness had been raised by defendant and considered by the trial court.

Defendant's testimony on redirect-examination vividly bears accusations that the prior inconsistent statement had been extracted by threats of imminent bodily harm. This we consider to have been sufficiently refuted by the testimony of Officers Mikolitis and Kaminski in rebuttal. They testified that they had conducted a one hour interrogation of defendant at the Area 1 Robbery Headquarters, and had neither made nor observed any threats of violence or promises of leniency to defendant. Accordingly, we do not agree that the State, by indirection, avoided a confrontation on the question of the voluntariness of his prior statement which, in any event, was offered only for its impeaching value.

There remains for consideration the related errors assigned by the respective defendants to the testimony elicited from the State's witnesses concerning the incriminating extrajudicial statements uttered by each defendant implicating the other as a

co-offender. In each instance, the statement given was inculpatory as to the declarant in addition to its implicating effects and was introduced by the State through testimony in rebuttal to that of the codefendants.

Police Officers O'Brien and Holton testified that they had escorted the codefendants from the Area 1 Headquarters to the Cook County Hospital on November 23rd to be viewed by the two victims. They arrived at Ward 22 sometime between 6:00 and 6:45 P.M. Present in the room were the two officers, the two defendants and the complainant, Edward Martin. At this time, Williams allegedly pointed to Martin identifying him as the man he and A. J. Whitney had victimized. Both officers related that Whitney "stood silent" manifesting no reaction to the accusation. At approximately 7:00 P.M., the officers and codefendants proceeded to Ward 61 where Watkins was convalescing. Watkins identified both defendants to the police as his assailants. Williams thereupon similarly identified Watkins as his victim implicating Whitney in the offense. Again Whitney was said to have "stood silent." No objection was made in behalf of either defendant with respect to this particular line of testimony.

The officers related that they thereafter transported the codefendants to the 2nd District Headquarters. Defendant-Whitney, out of the presence of his codefendant, was then asked if he would like to make a statement in view of his identification as one of the participants in the crime. At this point, counsel for defendants interjected an objection that Whitney's remarks, out of the presence of Williams, could not be admissible against the latter. The trial judge responded, "It will be admissible only as against him [Whitney]." The officers thereupon stated that Whitney gave a detailed account of his commission of the crime implicating Williams as a co-offender.

Generally speaking, the settled rule governing such circumstances is that the confessions or admissions of a codefendant, or those of a witness testifying against an accused, are not admissible in evidence against such accused unless made in his presence and assented to by him. People v. Tunstall, 17 Ill.2d 160, 161 N.E.2d 300 (1959). This principle has been held to apply whether or not the codefendants are jointly tried and requires a deletion from the statement of any reference to the identity and conduct of the other defendant. People v. Clark, 17 Ill.2d 486, 162 N.E.2d 413 (1959). Under circumstances, however, by which the implicated defendant was present at and assented to his confederate's statement, or otherwise so indicated by testifying to essentially the same subject at trial, such conduct is deemed as tantamount to an admission to the truth of the incriminating portions of the extrajudicial assertion and is said to become his own by adoption. People v. Hanson, 31 Ill.2d 31, 198 N.E.2d 815 (1964); People v. Saisi, 24 Ill.2d 274, 181 N.E. 2d 68 (1962).

While the court is not particularly swayed by the fact that this testimony was offered in rebuttal for the ostensibly limited purposes of impeachment; People v. Tunstall, 17 Ill.2d 160, 161 N.E.2d 300 (1959), we are satisfied that the principles enumerated have not been violated to the resulting prejudice of the codefendants.

As to Whitney's statement out of Williams' presence, we can perceive of no harm. In certain aspects Whitney's statement was similar to Williams' testimony on direct examination. Most importantly however, upon its receipt of this improper rebuttal testimony, and prompted by objection, the trial court expressly stated that Whitney's statement would be accepted only insofar as it pertained to the alleged declarant. The trial judge's

position more than adequately reflects the rule that the court, in a bench trial, is presumed to have reached its decision only upon the competent evidence before it. People v. Saisi, 24 Ill. 2d 274, 181 N.E.2d 68 (1962). We think the record demonstrates that sufficient measures were taken to insulate defendant-Williams from the damaging consequences of his codefendant's incriminating statement. People v. Williams, 36 Ill.2d 194, 222 N.E.2d 321 (1966); People v. Woods, 26 Ill.2d 582, 187 N.E.2d 692 (1963). As to the statements made by Williams in Whitney's presence at the hospital, we think the record warrants a like conclusion. Neither he nor his codefendant had, at any juncture, from and after their joint arraignment, made a request for a severance of their causes. Whether Whitney's silence in face of the two accusations by Williams was equivalent to his assent to the incriminating assertions against him is an open question. Even if improperly received in evidence however, absent any denial of the event, or an objection or a motion to strike the defective portion of that testimony in the trial court, defendant-Whitney is deemed to have failed to preserve that contention as grounds for reversible error on appeal. People v. Watson, 36 Ill.2d 228, 221 N.E.2d 645 (1966); People v. Green, 27 Ill.2d 39, 187 N.E.2d 708 (1963); People v. Butler, 78 Ill.App.2d 479, 223 N.E.2d 431 (1967).

For the above reasons, the judgments are affirmed.

JUDGMENTS AFFIRMED.

BURKE, P.J., and MC NAMARA, J., concur.

No. 51433

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

98 I.A.2/65

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| CARL H. PINKERMAN, Plaintiff-Appellant, | ) | Appeal from the Circuit Court of Cook County. |
| -vs- | ) | |
| EAGLE FOOD STORES, INC., Defendant-Appellee. | ) | Honorable Ben Schwartz Judge Presiding. |

George J. Moran, J.

Plaintiff appeals from an order of the trial court granting defendant's motion for summary judgment, in plaintiff's common law negligence action. The motion was grounded on the fact that the plaintiff was in the course of his employment at the time of the alleged injury and thus his remedy, if any, would be under the Workmen's Compensation Act.

In February, 1961, the plaintiff was employed by the defendant store. The complaint alleged that the plaintiff was injured when he slipped and fell on the sidewalk adjacent to the store. Subsequently, the deposition of the plaintiff was taken, wherein he stated that he was employed by the defendant store; that he was to report to work at 7:00 a.m.; that he parked in the employee's parking area in back of the store; and that the accident occurred at 6:50 A.M. on the sidewalk adjacent to the store. It is undisputed that the sidewalk was part of the employers premises and used by the employees as a means of entering and leaving.

Thereafter, the defendant filed a motion for summary judgment, contending that since the accident arose out of the course of plaintiff's employment, the plaintiff's remedy, if any, would be under the Workmen's Compensation Act and not at common law.

The plaintiff in answer to the motion averred that he did have a common law action since the accident occurred before he entered the store

where he would perform his duties of employment and that if the defendant believed that plaintiff was in the course of his employment, then the defendant's conduct in refusing to pay compensation was fraudulent. The summary judgment was granted, plaintiff's motion to vacate the judgment was denied, and this appeal followed.

The plaintiff contends that the defendant is estopped from raising the defense that the claim should have been under the Workmen's Compensation Act because the insurance representative of the defendant informed the plaintiff that he was not entitled to compensation; that this was done to deceive the plaintiff and that the plaintiff relied upon these misrepresentations and thus did not seek compensation. In this appeal the plaintiff does not contend that the act was not within the scope of employment and therefore outside of the provisions of the Workmen's Compensation Act, but only that the defendant is estopped from raising this defense. Thus it appears that the plaintiff is claiming that he now has a common law action which did not heretofore exist. However, we are unable to find any authority for the proposition that the fraudulent withholding of compensation gives rise to a negligence action at common law. Yet this is what the plaintiff contends. Accordingly, we find that the doctrine of estoppel is not applicable in this action.

Whether plaintiff could now maintain an action under the Workmen's Compensation Act and defendant be estopped from raising the time limitation for that action, or whether plaintiff could maintain a common law action based upon defendant's fraudulently inducing him to refrain from filing a Workmen's Compensation claim, we need not decide. However, we do note that in the motion to vacate the summary judgment, the plaintiff contends that the defendant acted fraudulently in denying recovery and that at the time of the injury the law relating to scope of employment was in the process of change. Thus it seems that the plaintiff contends that he, himself, was hesitant as to which course to follow due to the uncertainty of the law, but that the defendant should not have been confused by the uncertainty. Also, a copy of a Notice of Attorney's Lien, indicates that the

plaintiff was represented by counsel as early as July 25, 1961, or over six months prior to the termination period allowed for a Workmen's Compensation claim.

The plaintiff also contends that the summary judgment should have been denied on the ground that the defendant, in its answer to the complaint, denied that it owned, operated or maintained the store in question, and therefore cannot now contend that an employer-employee relationship existed. The basis for this denial was that the defendant was sued in the wrong name. The complaint was against the Eagle Food Center, Inc., instead of the proper designation of Eagle Super Market, Inc. However, it would be an exercise in futility to reverse the decision on this point since the net result would be an amendment by the plaintiff to name the proper defendant, an answer by defendant admitting that it owned and operated the store and a motion for summary judgment. Accordingly the motion to vacate the summary judgment was properly denied.

Judgment Affirmed.

CONCUR:

Honorable Edward C. Eberspacher

Honorable Joseph H. Goldenhersh

PUBLISH ABSTRACT ONLY

No. 51702

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| AVANELLA M. VAIL,<br>Plaintiff-Appellee, | ) | APPEAL FROM THE |
| | ) | CIRCUIT COURT OF |
| v. | ) | |
| | ) | COOK COUNTY. |
| WILLIAM F. VAIL,<br>Defendant-Appellant. | ) | HON. ROBERT L. HUNTER. |

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

On May 24, 1966, the trial court entered judgment for the plaintiff for $535 to cover arrearage due and owing for alimony and child support. At the same time the court modified an alimony and support order entered on May 22, 1958, by reducing the defendant's payments thereunder from $130 to $50 per month. The court made this modification effective as of May 1, 1966. Defendant seeks reversal of the order of modification on the ground that it should have been made effective December 1, 1965. The facts follow.

Plaintiff obtained a divorce from defendant on November 19, 1957. The decree provided for alimony and child support. On May 22, 1958, the decree was modified by reducing the alimony to $5 per month and child support payments to $125 per month. On July 30,1965, the defendant filed a verified petition asking for temporary suspension of the order relating to payment of alimony and child support. He alleged that he had been stricken with a heart attack on May 19, 1965; that he had been hospitalized until June 19, 1965; that he would be under the doctor's care and unable to work for many months; that he had incurred great medical expense; that his monthly income of $434.48 was not adequate to pay all of his expenses; and that a $5000 inheritance he had received from his

father was exhausted. On January 6, 1966, the court found the defendant to be $780 in arrears in alimony and support payments and ordered him to pay $20 a week toward the arrearage. On May 5, 1966, the court entered judgment against the defendant for $780 and ordered execution thereon. On May 24, 1966, the court entered judgment against defendant for an additional $535 in arrearage and ordered that effective as of May 1, 1966, the child support payments be reduced to $50 a month and the question of alimony be reserved "on the basis of defendant's claimed total net income of $239.40 per month."

Defendant contends that the order of May 24, 1966, modifying the support and alimony order, should have been made effective as of December 1, 1965 rather than May 1, 1966. He argues that the effective date of the modification should have been the date of the filing of his petition, which was July 30, 1965. His appeal however is based on failure to reduce from December 1, 1965, on the ground that it was on that date that his salary of $434.48 per month was terminated and he was placed on disability benefits of $239.40 per month. As there is no transcript of evidence and as defendant's petition only alleges that he was earning $434.48 per month, there is no way for us to determine whether the effective date of his income reduction was before the trial court. The fact of the income reduction first appears in the record in a petition to vacate the judgments of May 5 and May 24, 1966. That petition was denied and no appeal was taken therefrom.

The law is clear that past due payments of alimony and support are vested debts and cannot be set aside by a subsequent order. Craig v. Craig, 163 Ill. 176, 45 N.E. 153;

Banck v. Banck, 322 Ill. App. 369, 54 N.E.2d 577; Shuff v. Fulte, 344 Ill. App. 157, 100 N.E.2d 502. There is no vested right however to payments accruing after the petition for modification is filed. Adler v. Adler, 373 Ill. 361, 26 N.E. 2d 504. The trial court could have made its modification effective after the defendant filed the petition for modification, but the burden was on the defendant to establish that a change in his circumstances justified modification. Hoover v. Hoover, 307 Ill. App. 590, 30 N.E. 2d 940; Igney v. Igney, 303 Ill. App. 563, 25 N.E. 2d 608. In Arnold v. Arnold, 332 Ill. App. 586, 76 N.E.2d 335, the court held that a chancellor did not abuse his discretion by refusing to make alimony payments retroactive to the date the petition was filed.

In the instant case at the time the petition for modification was filed, the defendant was still receiving his full salary of $434.48 per month. He had incurred additional expenses because of a heart attack, but he had also recently received an inheritance of $5000. The trial court found that reduction of his alimony and support payments was not justified at the time of the filing of the petition, but that a modification was justified effective as of May 1, 1966. The order modifying the alimony and support payments was made on the basis of evidence heard by the trial court. In the absence of a transcript we presume that the evidence supported the finding and that the court did not abuse its discretion. Saxon v. Saxon, 24 Ill. App. 2d 116, 164 N.E. 2d 248.

The trial court did not err in refusing to make the modification order in question retroactive to the date

on which the petition to modify was filed nor to the date on which the defendant's monthly income was decreased. The judgment accordingly is affirmed.

JUDGMENT AFFIRMED

DEMPSEY, P.J. and SULLIVAN, J. concur.

No. 51887

98 I.A. 2 304

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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | ) | APPEAL FROM THE |
| | ) | CIRCUIT COURT OF |
| v. | ) | COOK COUNTY, |
| | ) | CRIMINAL DIVISION. |
| WILLIE KENNEDY (Impleaded), Defendant-Appellant. | ) | HON. EDWARD F. HEALY. |

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In a jury trial the defendant was found guilty of armed robbery and sentenced to serve three to six years in the State Penitentiary. On appeal he contends among other things that he was prejudiced by improper comments made by the State during closing argument and that the court erred in refusing to allow him to impeach the testimony of an identifying witness by proof of prior inconsistent statements. The facts follow.

On April 8, 1966, Roosevelt Ellis was working as the sole employee on duty at a service station at 331 North Orleans Street, Chicago. With Ellis was a friend Robert Falcenthal who frequently visited with him while he worked during the early morning hours. Both Ellis and Falcenthal testified that the defendant was one of three men who entered the station at 5:00 a.m. and robbed them of about $175. The men threatened to "come back and blow the place up" if they called the police and then locked them in the back room. After the robbers left, Ellis and Falcenthal worked on the lock until it opened and Ellis then called the police and reported the robbery.

Ellis testified that two days later at about 2:30 a.m. he observed a car circling the service station. At about

6:00 a.m. the car stopped in the station. Ellis observed three men in the car and recognized the driver as one of the men who had robbed him two days earlier. He testified that this man was the defendant Kennedy. Kennedy purchased 32 cents worth of gas, left the station and returned twenty minutes later for 50 cents worth of gas. Ellis called the police after the car left and gave them the license number and a general description of the car. At about 7:30 a.m. the police arrested the defendant and brought Ellis to the scene of the arrest for identification.

Later the same day Ellis and Falcenthal picked the defendant out of a line-up of six men at the police station. Ellis was present when Falcenthal made the identification, but the latter testified that they did not communicate with each other prior to the identification other than to exchange greetings.

The defendant testified that on the night of the robbery he was with his girl friend at her mother's apartment at 340 West Elm Street, Chicago. He testified that he arrived there at about 11:30 p.m. on April 7th and did not leave until noon the next day; that his girl friend, her mother, her six brothers and sisters and a neighbor named Marcus all saw him at the apartment on that night. None of those people testified at the trial. The defendant admitted that on the morning he was arrested he had stopped to purchase 32 cents and then 50 cents worth of gas from Ellis.

Defendant first contends that it was improper for the State to comment during closing argument on his failure to call witnesses to support his alibi. In closing argument the State's Attorney told the jury, "There were nine persons

who could have in some way accounted for his presence in that house during the time that he said he was there. I think that the silence from this stand from those nine people is very eloquent evidence of the fact that no such circumstances ever existed." That comment on the evidence was not improper. It is well settled that where a defendant undertakes to prove that at the time of the commission of an offense he was at another place with a number of people, his failure to produce such witnesses is a proper subject for comment by the State. People v. Gray, 52 Ill. App. 2d 177, 201 N.E.2d 756; People v. Gray, 57 Ill. App. 2d 221, 206 N.E.2d 821; People v. Smith, 90 Ill. App. 2d 310, 234 N.E.2d 31.

Defendant's second contention is that the court erred in refusing to allow him to impeach an identifying witness through inconsistent statements made at a prior hearing. The defendant's attorney attempted to impeach the State's witness Falcenthal by cross-examination in the following manner:

> "MR. CAWLEY: Since the time of the line-up have you testified in any courtroom?
>
> MR. FALCENTHAL: Yes, I think -- I know we went to Boy's Court at 1121 South State.
>
> MR. CAWLEY: Did you testify at that time?
>
> MR. OPLANKA (Assistant State's Attorney): Object to that, your Honor.
>
> THE COURT: He may answer.
>
> MR. FALCENTHAL: Did I testify?
>
> THE COURT: Do you have any transcript?
>
> MR. CAWLEY: No, Judge.
>
> THE COURT: Sustained. Objection sustained."

The law in Illinois is clear that a transcript is not necessary in order to lay the foundation for impeachment of a

witness by inconsistent statements at a prior hearing. People v. Dixon, 28 Ill. 2d 122, 190 N.E.2d 793; People v. Whitehead, 35 Ill. 2d 501, 221 N.E.2d 256; People v. Irish, 77 Ill. App. 2d 67, 222 N.E.2d 114. The State contends however that the defendant did not establish that it was attempting to impeach Mr. Falcenthal and that it is not clear from the record on what ground the trial court sustained the State's Attorney's objection. It is clear however that defense counsel was attempting to lay a foundation to impeach Falcenthal and that the court refused to allow him to do so because he did not have a transcript of the testimony given by Falcenthal on the former trial. This was error and requires a new trial.

The judgment is reversed and the cause is remanded for a new trial and for such other and further proceedings as are not inconsistent with the views herein expressed.

JUDGMENT REVERSED AND
CAUSE REMANDED

DEMPSEY, P.J. and SULLIVAN, J. concur.

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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | APPEAL FROM |
| vs. | CIRCUIT COURT |
| JAMES GAULDEN, Defendant-Appellant. | COOK COUNTY, |
| | HON. RICHARD J. FITZGERALD, Presiding Judge. |

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

In a bench trial James Gaulden, 26 years of age, was found guilty of the crime of burglary and sentenced to a term of three to six years in the penitentiary. Appealing, he maintains that he was not proven guilty beyond a reasonable doubt.

The first witness for the People was Jerry Crawford, an employee of Littal Sales, Inc., for eleven years, and manager of its store at 3630 Roosevelt Road, Chicago. The store sells clothing, jewelry, appliances and furniture. It is on the north side of Roosevelt Road and has two large store windows with a door in the middle. On July 14, 1966 the witness left the store at about 7:00 P.M. He was the last to leave and locked the store by swinging an iron gate across the entire front of the entranceway, which locks at the bottom, and is locked to the right on a sliding door. When he left there were about thirty reconditioned television sets in the store, as well as other merchandise. He returned the following morning to find that both windows were smashed, clothing was strewn about and none of the thirty television sets remained. He identified People's Exhibit No. 2, a television set bearing the name of "Sahara," as a set owned by Littal Sales, Inc.

Robert Christian, a Chicago Police Officer, testified that he and his partner were on duty in plain clothes in an unmarked police car on July 14, 1966. They had occasion to witness a number of disturbances during the period they were on duty from 6:00 P.M. to 2:30 A.M., because there was a riot condition in the area. About 1:00 A.M., the witness and his partner were driving west on

Roosevelt Road. The witness was driving the police vehicle. The street lights were in operation at the time. As the police car approached the store of Littal Sales, Inc., Officer Christian noticed that the windows of the store were completely knocked out. His attention was particularly attracted to the store because he observed no one looting the store unlike other wide open stores he had observed that night. The witness did not see anyone in the vicinity of the broken glass, but there were some people on the south side of Roosevelt Road. Then Officer Christian observed the defendant inside the Littal Sales, Inc., store. Before the witness could stop the car, the defendant and another man emerged from the store. The squad car was stopped about a car length in front of the store. As the officers identified themselves the other man dropped his record player, ran east on Roosevelt Road and managed to escape. The defendant, however, was carrying a bulky television set and was captured about five or six steps from the window, as he attempted to run west. Officer Christian identified People's Exhibit No. 2 as the television set that defendant was holding when he was captured. The witness did not see any other merchandise in front of Littal Sales, Inc., store besides the record player dropped by the other man. Furthermore neither Officer Christian nor his partner fired a shot at that time.

The defendant testified that he was single, that he lived at 1244 South Spaulding, worked at Congress Steel for seven months, said that he had pleaded guilty to a previous charge of burglary for which he had served four months and 25 days and that he was currently on three years probation. As to the night in question, he had been at his girlfriend's house until about 11:00 P.M. At this time, he started on his way home, was walking along Roosevelt Road and passed some boys who were throwing bricks at a passing police car. Then two police officers got out of their vehicle and began

firing into the air. The defendant fell to the ground four or five doors east of the Littal Sales store. The area in which defendant then found himself was occupied by 15 or 20 television sets and clothing, all of which were piled up on the street. The defendant noticed another police car containing five officers parked in front of the Littal store. Defendant saw four of the five officers take the merchandise from the street and stack it on the sidewalk. As the defendant lay on the ground, a police officer came over to him with drawn gun and arrested him. The defendant denied ever seeing the television set marked as People's Exhibit No. 2. The closest thing to him on the ground was a box of women's shoes dropped by a woman who had been shot by the police only minutes before. The woman was right across the street when she was shot.

After the defense rested, Officer Christian was recalled in rebuttal and stated he did not see anyone, civilian or policeman, in the immediate area and that when the defendant was captured he was standing up and holding the television. A second rebuttal witness, Officer John Littleton, was called. He was Officer Christian's partner on this night. Concerning the material facts his testimony was essentially the same as that of his partner. He observed the defendant emerging from the window of Littal's store holding the television and observed another man escape by running east on Roosevelt Road. He testified that defendant was standing up at the time of his arrest, that no shots were fired by anyone for any purpose at the time of the arrest, that there were no other police officers or police vehicles in the vicinity of this store at the time in question and that defendant got only five or six feet with the television set before he was captured. Officer Littleton's testimony differed from Officer Christian's as to the details of what happened at the time of the arrest. Officer Littleton remembered seeing a couple of ladies who were standing around in the area.

Also, the witness testified that the defendant and the other man went in the same direction as the police left their auto. That direction was east.

The defendant was seen in the Littal store by Officers Christian and Littleton. The area was well lighted. A second man, attempting to steal a record player escaped by running down Roosevelt Road. The defendant was arrested as he stood up holding the stolen television. Both officers testified that they observed defendant in the store, that he emerged carrying a television set that didn't belong to him and he was captured as he held this television which was introduced into evidence and identified by both officers and the manager of the store. There were two minor discrepancies in the testimony of the officers. Officer Christian testified that the defendant ran west carrying the television set and was captured. Officer Christian who was driving west bound on Roosevelt Road did not see any people on the south side of the street. Officer Littleton testified in rebuttal that both men ran in the same direction. This witness also observed the defendant with the stolen television set. Officer Littleton testified that he observed two women about fifteen feet from the defendant. Courts recognize that people can reasonably differ as to the details of an occurrence. It will be noted that there was no impeachment of either of these officers as to the material points. The trial court had the duty of judging the credibility of the witnesses. Defendant's testimony was contradictory.

The state presented a strong case against the defendant. We find that the testimony supports the finding of the trial judge, that the defendant was guilty of the crime of burglary as charged beyond a reasonable doubt. Therefore, the judgment is affirmed.

JUDGMENT AFFIRMED.

McNAMARA, J., and LYONS, J., concur.

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| MORRIS KOZAK, | ) | |
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| Plaintiff-Appellee, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, |
| | ) | |
| vs. | ) | CHANCERY-DIVORCE DIVISION. |
| | ) | |
| PEARL KOZAK, | ) | Hon. Cornelius J. Harrington, |
| | ) | Judge Presiding. |
| Defendant-Appellant. | ) | |

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The plaintiff, Morris Kozak, filed a two count complaint in equity naming Pearl Kozak as the defendant. In Count I the plaintiff sought the severance of numerous assets held in joint tenancy and accumulated during their relationship with the funds of both parties. In Count II the plaintiff sought the rescission of an inter vivos gift on the basis of a mutual mistake of fact and law. After ruling on motions testing the legal sufficiency of the complaint and certain portions of the answer, the chancellor referred the cause to a master in chancery for the taking and reporting of testimony. In addition, the master was to report his conclusions of law and fact therein. Extensive hearings were held before the master. In the final days of testimony, the defendant appeared pro se, having discharged her earlier attorneys.

Regarding Count I of the complaint, the master's report found for the defendant, holding that the joint tenancy assets accumulated during their relationship with joint funds were to be severed in equal proportions, and not in proportion to the respective contributions of the parties, as sought by plaintiff. This finding was adopted by the chancellor in his subsequent decree. No appeal is taken from this portion of the decree.

The defendant appeals, however, from that portion of the decree adopting the master's report in decreeing that the inter vivos gift was rescinded due to a mutual mistake of fact and law. The gift so rescinded involved the transfer of the minority interest

in the plaintiff's closely-held corporation, Advance Neon Signs, Inc. The defendant also appeals from three orders entered by the chancellor in various stages of this extended litigation: (1) the order granting the motion of the plaintiff to strike various portions of the defendant's answer which included, inter alia, the defense of in pari delicto; (2) the order denying the defendant's verified petition which sought to modify an earlier order of the trial court which required her to deposit with the clerk of the court 34% of her 50% share of joint tenancy assets as a prior condition to vacating the decree, thereby allowing her to file exceptions to master's report in lieu of objections; (3) the order denying defendant's verified petition to vacate the decree.

Initially, it should be stated that the instant case solely concerns itself with the ownership of a single stock certificate containing 73 shares of Advance Neon Sign, Inc. common stock. This certificate represents a 49% minority interest in the corporation which is otherwise controlled by the plaintiff. He is the president and principal operator of said corporation, organizing it in 1936. Both parties to this litigation are in their sixties.

The complaint alleges that in 1949 the parties to this lawsuit went through a purported marriage ceremony wherein the defendant took the name of and since has been known as Pearl Kozak. This marriage was annulled by decree in 1963. In 1957 the defendant complained to the plaintiff that she had no interest in Advance Neon Signs, Inc. and represented to him that if she were in fact his wife, she should be "a partner" in all of his assets and should be entitled to an almost equal participation in said corporation. Moreover, if the parties were to continue as man and wife, plaintiff should convey to defendant 49% of the stock ownership in said corporation. Continuing, the complaint alleged that at that time

(i.e., 1957) both plaintiff and defendant were laboring under a mistake of fact and law that they were husband and wife. The husband, in an effort to maintain the marriage relationship, which both parties assumed existed, caused one stock certificate for 73 shares in said corporation to issue in defendant's name. The complaint further alleges that although the plaintiff has demanded that said certificate be returned for cancellation and for issuance of a new stock certificate to himself, the defendant has failed and refused to deliver it.

In his prayer for relief, plaintiff asks that the court enter a decree finding that defendant has no title to or interest in said stock certificate and finding further that said stock certificate was delivered to defendant under a mutual mistake of fact and law. The prayer also requests that the court order should then order the defendant to deliver said stock certificate, properly endorsed, to plaintiff or to the corporate secretary for transfer to plaintiff.

Almost a year after the above complaint was filed, the defendant filed her motion to dismiss the complaint, alleging, inter alia, the defense of in pari delicto. After a hearing, defendant's motion to dismiss was denied and she was ordered to answer. In her answer, the defendant stated that both parties knew that they were first cousins and that their marriage violated the statutes of Illinois at the time of their marriage in 1949 and during their subsequent life together. She admitted that in 1957 she called plaintiff's attention to the fact that she had no interest in said corporation and if the parties were to continue their relationship, they should share equally in the stock of that company. Continuing, she denied that at the time of the gift the parties were laboring under a mistake of fact or law that they were husband and wife and denied that any such mistake was a cause for the issuance or delivery

of the certificate now in controversy. She stated that in fact the plaintiff had a free choice in regard to this gift.

The answer denied other allegations in the complaint and renewed the defense of in pari delicto. Pursuant to plaintiff's motion to strike portions of defendant's answer, the court, after argument, ordered that the in pari delicto defense, which had been mentioned earlier in defendant's motion to dismiss the complaint and which defense she had renewed in her pleading, would now be stricken from her answer. The parties then proceeded to the master in chancery for the taking of evidence.

During the hearings before the master, the defendant changed attorneys of record twice before finally proceeding pro se in the final two days of the hearings. The record contains assertions by the defendant that the attorneys for the plaintiff had kept her from getting any legal representation as the attorneys she saw were allegedly influenced by what the plaintiff's lawyers conveyed to them. This was vigorously denied by the attorneys for the plaintiff. The hearings disclosed that the parties to this lawsuit are first cousins to each other. In 1949 they went through a marriage ceremony conducted by an Orthodox rabbi in Chicago. Marriages between first cousins are valid under the religious tenets of these parties, Orthodox Judaism. However, under Illinois statutory law, as then existing and as presently existing, marriages between first cousins are void. See Ill. Rev. Stat. (1967), ch. 89, sec. 1.

In the affidavit for marriage license signed by both parties to this litigation, they declared under oath that they were not blood relatives. This affidavit was introduced into evidence by the defendant to show there was no mutual mistake of fact in 1949. The defendant testified that both parties knew the marriage was illegal under Illinois law, but felt that the marriage was valid because of the attitude of Orthodox Judaism regarding first cousin

marriages. The plaintiff testified that he believed the marriage was legal because it was performed by an Orthodox rabbi. He also stated that in 1949 he did not know marriages between first cousins were void in Illinois. He first learned of this in 1963 and immediately filed for an annulment.

Regarding the gift of stock presently in controversy, the defendant stated that in the summer of 1957 she learned for the first time through a chance remark made by Sylvia Kozak, plaintiff's sister, that Sylvia owned shares in the plaintiff's corporation. Defendant then requested equal participation in the corporate stock of the company, if the parties were to continue their relationship. When plaintiff allegedly delayed in complying with this request, defendant left a note in their apartment which stated in effect that either the parties share equally or they terminate the relationship as husband and wife. Defendant then went on to testify that plaintiff had freedom of choice in the matter. The following day plaintiff had the certificate transferred from his sister to defendant. Before proofs were closed, plaintiff testified that he executed this inter vivos gift to preserve a marriage which he thought was valid at the time.

The master's findings of fact and recommendations which are material to this appeal and which were adopted by the chancellor in his decree are as follows:

> 31. In the opinion of the master, this affidavit convinces that the parties knew that there was a serious question about their right to marry, because both of them engaged in a deliberate deception to obtain their marriage license. However, neither of them obtained proper legal advice; and, therefore, there is some doubt in the record as to whether either of them actually knew that their purported marriage was entirely void. It is plain that neither of the parties, at the time of the ceremony, understood fully and clearly all of the legal consequences of their conduct and of their attempted marriage. On the contrary, they both believed that their marriage by the Orthodox rabbi was valid, as evidenced by their future conduct. This appears from plaintiff's testimony and defendant's verified answer.

32. As above pointed out, in another section of this report, defendant attempted to rely upon these circumstances as a defense of pari delicto. However, the court has stricken this defense on motion of plaintiff. In addition, the master has concluded independently that the defense of pari delicto is not applicable here and cannot be relied upon by the defendant.

* * *

56. It is undisputed that defendant made no financial contribution of any kind to this company, nor did she render any services in connection therewith. The company was managed and operated by plaintiff almost exclusively with the assistance of his sister.

* * *

59. Plaintiff testified positively and directly that he caused the stock to be transferred to defendant only because of his mistaken belief that the parties were lawfully married. Upon review of the authorities cited by plaintiff's counsel, the master is of the opinion that this testimony is competent evidence. In addition, defendant herself, testified that the stock was given to her by plaintiff only by way of submission to her demands and in an effort to save what both of the parties thought had some validity as a marriage relationship. Although the parties both may have had initial doubts about the effect of their blood relationship upon the marriage, the master is of the opinion that, by the time of the transfer of the Advance Neon Stock to defendant, both of the parties were motivated by a desire to preserve their status and relationship, which both of them had come to accept as valid and binding.

* * *

61. The master finds that the stock was issued to defendant by plaintiff as a result of plaintiff's mistake of intermingled law and fact regarding the validity of his purported marriage to defendant and as a result of plaintiff's desire to perpetuate a relationship and a status which in fact and in law did not actually exist. The master further finds that defendant acted under the same mistake when she demanded issuance of the stock to her. In the opinion of the master, these mistakes require correction by this court.

62. The master accordingly finds and concludes that, in this portion of the matter, the equities are with plaintiff and that plaintiff is entitled to a return to him from defendant of the 73 shares of stock in Advance Neon Signs, Inc., . . . . It is, accordingly, recommended that a decree be entered herein requiring defendant to endorse said certificate of stock and to deliver same to plaintiff as his sole property. . . .

* * *

On appeal, the defendant contends, inter alia: (1) the lower court committed reversible error by incorrectly striking the

defendant's pari delicto defense from her answer; (2) the master engaged in certain improper and prejudicial conduct which denied defendant a fair and impartial trial; (3) certain paragraphs of the decree material to the appeal are invalid because contrary to the manifest weight of the evidence; (4) the lower court committed reversible error by its orders refusing to vacate the final decree and refusing to modify the portion of an earlier court order requiring the defendant to deposit 34% of her 50% share of joint tenancy assets as a prior condition to the vacation of the earlier final decree.

In the view which we take of this case, defendant's pari delicto defense would not aid her. In equity cases, such a defense is quite similar to the rule that a person cannot come into equity with unclean hands and seek justice. However, as stated by our Supreme Court in Shadden v. Zimmerlee, 401 Ill. 118, 128, 81 N.E.2d 477, 482 (1948):

> ". . . In Pitzele v. Cohn, 217 Ill. 30, we stated 'the wrongdoing which will defeat a recovery on the ground that a litigant does not come into a court of equity with clean hands must be in regard to the matter in litigation, and does not apply to the misconduct of the complainant in other matters not immediately connected with the then pending litigation.' . . . ."

In the instant case, the defendant's pari delicto defense is based upon events leading up to the marriage ceremony in 1949, such as the false affidavit submitted by both parties for the marriage license. Such a defense tends to overlook the fact that during the intervening eight years before the gift in controversy occurred, the parties cohabited as husband and wife. Regarding the gift itself, which is the matter in litigation, there is no evidence that the plaintiff was guilty of unclean hands in that transaction. He did not execute the gift to unjustly evade creditors or taxes or attempt to use the transaction for any other unjust purpose. Any wrongdoing by the parties occurred eight years

prior to this gift. The decree adopted the master's report which stated that the in pari delicto defense was not applicable to this case. This was proper within the facts and circumstances of this case.

Secondly, the defendant asserts that the master engaged in certain improper and prejudicial conduct which denied her a fair and impartial trial. Specifically, it is alleged this occurred when the master heard the greater portion of the evidence and concluded the hearings at a time when Pearl Kozak was trying to find a lawyer, but was without representation, causing her to proceed pro se. It is the defendant's contention that the master should have refused to proceed with the hearing until she had obtained a lawyer. Such an argument tends to overlook the fact that this matter had been pending in the courts for almost three years. Furthermore, the record shows that in the instant case the defendant was represented by or had consulted with eight different sets of attorneys. The cause had been continued for a month prior to the final days of hearings so as to enable defendant to secure counsel. She contacted one firm but they withdrew without entering an appearance. On the day in question, the defendant appeared and blamed the opposing lawyers for her predicament, which was vigorously denied. She then proceeded to represent herself. Hence, the master was in a position where the litigation was proceeding very slowly and there was nothing indicating that the defendant was about to gain legal representation in the future. She had been given a month to retain an attorney but her efforts had failed. To require the master to delay the proceedings further until the defendant retained counsel, which was a total uncertainty, would be to give the defendant an advantage which is not extended to other litigants.

It is also asserted that the master committed prejudicial

error when he said to the defendant during the final hearings, "You are going to lose the case better than a lawyer could." The defendant argues that such a remark showed that the master had prejudged the case and was going to rule against her, although all the evidence had not been submitted to him. Aside from the fact that it is difficult to perceive how one remark by the master in a transcript of proceedings encompassing close to 350 pages could be prejudicial error in itself, the record shows that this remark is taken out of context. It occurred when defendant was cross-examining plaintiff and was inquiring into a collateral matter, namely, the manner in which plaintiff's older sisters had interfered with their relationship. The master interrupted to state that the inquiry was beyond the realm of materiality. When the defendant objected, the master stated that she was a better lawyer than that and that she was doing very well. When defendant replied further, the master uttered the statement now under review. This statement by the master was innocently made near the end of a trying fourth session of hearings held in two days. The contention is without merit.

The defendant also contends that certain portions of the decree, material to this appeal, are invalid as they are contrary to the manifest weight of the evidence. Hence, the defendant requests this court to review and evaluate the evidence which was presented before the master. Appellate tribunals so proceed if objections are filed to the master's report and if overruled, exceptions are filed before the trial court prior to a hearing on the contents of the decree. Such a procedure narrows the issues on appeal. In the instant case, the defendant failed to file objections before the master, or exceptions before the chancellor. Accordingly, this court finds that in this case the proper rule to follow is the one which states that the master's

findings of fact are conclusive as against a party who has the right, but does not object in apt time to the master's report by filing objections before the master and if overruled, by filing exceptions before the chancellor prior to the entry of the decree. See Matthews v. Whitehorn, 220 Ill. 36, 77 N.E. 89 (1906) and Postel v. Hagist, 251 Ill. App. 454 (1928).

The defendant attempts to excuse her failure to file objections before the master by urging that the master failed to explain the necessity for so doing in his notice to her. In the case of Matthews v. Whitehorn, supra, this contention was answered adversely to the defendant. Our Supreme Court there held that if the defendant did not know what method to follow to protect herself, the master was not responsible. In that case the defendant was in fact proceeding pro se at that stage of the proceedings because her attorney of record had not appeared before the master during the hearings, and her special solicitor, who had so appeared, had withdrawn after the hearings and before the report was issued. If the master cannot be held responsible for not telling a defendant, in effect appearing pro se, the procedure to follow to protect herself, neither can he be held responsible for failing to tell her the necessity for so acting. In the instant case the master did advise the defendant that the rules of court require that any litigant objecting to any of the findings or conclusions of the master's report is required to file written objections with the master. More cannot be reasonably expected of any master.

The defendant also attempts to excuse her failure to file objections to the master's report by contending that the master did not indicate in his notice that his attached report was tentative or only a proposed report. However, it is undisputed that the master gave the defendant proper notice regarding the time, place, and deadline for the filing of any objections to his

report. The defendant did not have an attorney at the time representing her, but such a communication from the master is sufficient to put a reasonable person on notice that the master's attached report was not yet final but was tentative.

The defendant also contends that the trial court erred by arbitrarily refusing to vacate the final decree and by arbitrarily refusing to modify an earlier order requiring the defendant to deposit 34% of her 50% share in joint tenancy assets as a prior condition to the lower court's vacating of the final decree thereby allowing the defendant to file exceptions in lieu of objections to the master's report. The record shows that on December 9, 1966, within a week after the decree was entered, the defendant filed a verified petition alleging that on December 3, 1966, she received in the mail a notice mailed by counsel for plaintiff on November 29, 1966, and stating that on December 2, 1966, his counsel would appear and present a Decree in this cause. Furthermore, she alleged she first learned on December 5, 1966, that a decree had been entered against her on December 2, 1966, and she had now retained counsel to represent her interests. Her prayer for relief asked for an order vacating the earlier decree upon "such conditions as the Court may consider fair and equitable" and for leave to allow her to file exceptions to the master's report in lieu of objections.

Three days later, December 12, 1966, the court entered its order listing the conditions upon which it would vacate its earlier decree, which conditions included the one that defendant must deposit 34% of her 50% interest in joint tenancy assets within twenty days from date of the order. Some three weeks later, January 3, 1967, defendant filed her verified petition praying for a modification of the 34% deposit condition and asking that she would not be required to make this deposit. This petition was

denied on January 13, 1967 and defendant was given about two weeks to comply with the deposit conditions. A month later defendant's new counsel informed the court that she would not comply with the 34% deposit requirement leading the court to enter an order denying the motion of the defendant to vacate the earlier decree.

On appeal, defendant urges these conditions were arbitrary and not equitable as she could not support herself on the assets which she would be allowed to retain. Such a contention overlooks the point that before plaintiff filed his complaint in this cause, defendant had taken possession of all the assets and had retained possession for almost three years until after the decree was entered. Since it is admitted by both sides that the plaintiff also sought leave to file exceptions in lieu of objections regarding the decision as to Count I of the complaint upon learning of defendant's petition, it is reasonable to conclude that the chancellor decided that defendant should make this deposit so as to obviate the necessity of future enforcement orders in case the terms of the decree should be altered concerning Count I of the complaint.

Plaintiff had argued that the joint tenancy assets should be severed according to the proportionate contributions of both parties and there was evidence that this would be a 84%-16% relationship, with plaintiff's share being the former figure. Since it appeared that both parties were now seeking to question the entire decree as both sought to file exceptions in lieu of objections, the conditions imposed by the chancellor were equitable. The defendant had possession of all the assets. The plaintiff had possession of none. The chancellor used the proportionate contributions figures provided the master during the hearings. These were approximate calculations, but were the only concrete figures available. It must not be overlooked that even if these substantial assets were to be deposited with the court, the

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interest and dividends on them would continue to be paid to the parties of record, plaintiff and defendant. This, too, would be a substantial sum. The conditions specified by the court were equitable within the facts of this case.

The defendant also argues that the decree should have been vacated because she did not receive notice of the plaintiff's intention to obtain a decree until the day after it was rendered. However, plaintiff's notice of motion specifying entry of the decree in question is included in the record. It contains a certificate of attorney signed by one person, an affidavit of service signed by another, and an acknowledgment by a notary public, indicating that the notice was mailed to the defendant and to the master, three days before the decree was entered. The defendant offers nothing to explain why the notice was not received allegedly until after the decree had been entered. The decree would have been vacated if the defendant had complied with the chancellor's equitable conditions, which she herself had sought.

This court has examined the defendant's other contentions and the authorities cited in support thereof. We find them to be nonpersuasive within the facts of this case.

The decree and orders of the trial court are affirmed.

DECREE AND ORDERS AFFIRMED.

BURKE, P.J., and MC NAMARA, J., concur.

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| MONIKA ANDES, Plaintiff, vs. ABRAHAM ROSKIN and RICHARD NEUBERG, Defendants. and RICHARD NEUBERG, Counter-Plaintiff Appellee, vs. ABRAHAM ROSKIN, Counter-Defendant, and OLIVER E. MEYER, Third Party Defendant-Appellant. | ) APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, COUNTY DEPT. LAW DIVISION ) HON. EDWARD SCHULTZ, JUDGE PRESIDING |

MR. PRESIDING JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

Oliver E. Meyer, third party defendant in the instant personal injury action, was granted summary judgment as to the issue of liability against Richard Neuberg, counter-plaintiff. He prosecutes this appeal from an order denying his costs and attorney's fees from Neuberg.

Monika Andes, who was a passenger in an automobile driven by Oliver E. Meyer, commenced this action by filing suit against Abraham Roskin and Richard Neuberg, alleging in her complaint that she suffered injuries as a result of various negligent acts committed by the latter two individuals in the handling of their respective automobiles. Thereafter, Neuberg filed a counterclaim and complaint against Roskin and Meyer, alleging that his automobile had been damaged as a result of their negligent driving. Meyer moved to strike Neuberg's counterclaim and complaint. After a hearing his motion was denied, and he filed an answer. The next

step in the proceedings was the filing of a motion for summary judgment by Neuberg against Andes and Roskin. Said motion was supported by Neuberg's sworn affidavit, and was accompanied by excerpts taken from transcripts of the discovery depositions of Roskin, Andes and Meyer. Shortly thereafter, Meyer made a motion for summary judgment and costs and attorney's fees against Neuberg. Attached in support thereof was the aforementioned affidavit of Neuberg. Summary judgment for Meyer against Neuberg was allowed, and Meyer was dismissed from the lawsuit. Meyer's motion for costs and attorney's fees was continued. At a later date, after hearing argument of respective counsel, the trial judge denied the motion for costs and attorney's fees.

Meyer argued before the trial court, and he raises the issue again here on appeal, that his motion for costs and attorney's fees made pursuant to the provisions of Section 41 of the Civil Practice Act (Ill. Rev. Stat. 1965, ch. 110, §41) should have been granted because Neuberg filed his third party complaint against him without having reasonable cause to believe that the allegations of negligence contained therein were true. Meyer calls our attention to Neuberg's affidavit in which the latter states that Meyer's vehicle had been stopped for thirty seconds waiting for a traffic light to change at the time of the accident; that his car likewise was stopped immediately behind Meyer's car; and that the accident in question occurred when the automobile driven by Roskin struck his car in the rear, causing his vehicle to crash into the car driven by Meyer. Meyer contends that in light of this affidavit Neuberg's third party complaint in which he alleges that Meyer's negligence was responsible for damage to his vehicle was clearly made without reasonable cause and in bad faith.

Section 41 of the Civil Practice Act provides as follows:

> Untrue statements. Allegations and denials made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial.

The legislative intent behind Section 41 is an attempt to penalize the litigant who brings frivolous suits without any basis in law or pleads false matters thereby causing his opponent to expend funds needlessly for the retention of an attorney. Greengard v. Cooper, 78 Ill. App. 2d 86, 221 N.E.2d 775. A motion for attorney's fees under Section 41 is addressed to the sound discretion of the trial judge (Horween v. Dubner, 68 Ill. App. 2d 309, 216 N.E.2d 288), and before the trial judge can exercise said discretion the record must disclose evidence of bad faith on the part of the pleader. Year Investments, Inc. v. Joyce, 44 Ill. App.2d 367, 195 N.E.2d 21.

It appears from the record in the instant case that Neuberg's complaint and counterclaim, complained of by Meyer, was filed prior to the taking of the discovery depositions previously mentioned. Furthermore, the record reveals that Oliver Meyer filed suit against Neuberg for damages to his vehicle (also prior to the taking of the discovery depositions.) Meyer in his suit alleged negligence in spite of the fact that in his deposition he stated that the car behind him (Neuberg's automobile) was stopped for at least ten seconds behind him, and that he couldn't say whether there was any space separating the rear of his car and the front of Neuberg's vehicle.

It is apparent to us that the trial judge considered the foregoing factors of prime importance in determining that Neuberg had not been guilty of bad faith in filing suit against Meyer. The trial judge stated prior to announcing his determination that Meyer, in filing suit against Neuberg, had proceeded in the same manner as Neuberg, and therefore, should not complain about the latter's bad faith in bringing suit. The Court further concluded that it was proper to bring in the other people involved in the accident for the purpose of the disposition of the claims of all of the parties involved in one lawsuit.

We cannot say that the trial judge abused his discretion in determining on the basis of the facts and circumstances before him that Neuberg had not been guilty of bad faith in filing his third party complaint against Meyer. He could properly have found that Neuberg was unaware at the time of filing his complaint of the facts that would later be revealed by deposition. He could also properly have found that Meyer's suit against Neuberg was not brought in any "better" faith than had been Neuberg's. We believe that the Court properly determined that all of the parties involved in the accident should be present in one lawsuit.

The attorney's for the third party defendant attempt to distinguish his action against Neuberg from Neuberg's action against him on the theory that Neuberg may have failed to properly use his brakes after being struck from behind, or may have stopped his car too close to Meyer's vehicle. True, either of these conditions would constitute negligence on the part of Neuberg. The testimony of Meyer in his discovery deposition, however, refutes this claim of negligence since he testified that he didn't know how close Neuberg's car stopped behind him, and his statement that Neuberg's car was also standing still for ten seconds before the accident

negates any charge that Neuberg failed to properly use his brakes.

We believe that the factual situation presented in Ready v. Ready, 33 Ill. App.2d 145, 178 N.E.2d 650, cited by the third party defendant, where the beneficiary of a testamentary trust improperly sued the business manager of the trust for an accounting without first demanding that the trustee bring the action, is significantly distinct from the one presented in the case at bar. The Ready decision is, therefore, distinguishable.

We see no reason for reaching a different conclusion than that of the judge in the instant case. The judgment of the Circuit Court is therefore affirmed.

AFFIRMED.

(ABSTRACT ONLY)

ADESKO AND MURPHY, JJ., CONCUR.